Dr Mohd Adnan bin Sulaiman & Anor v Kumpulan Perubatan (Johor) Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 23NCVC-74–05 OF 2012
ABDUL RAHMAN SEBLI J
19 SEPTEMBER 2013

Contract — Breach — Agreement — Claim for damages — Shareholder of hospital set up new hospital nearby — New hospital offered similar services — Six consultants left old hospital to work at new hospital — Whether shareholder owed fiduciary duty to old hospital — Whether contract fundamentally breached — Whether there was conflict of interest

The plaintiffs had set up a private hospital ('PH') and entered into a joint venture agreement ('JVA') with the defendant which was responsible in, inter alia, providing financial support. However, the plaintiffs later found out that the defendant was in the midst of setting up a new hospital ('the new hospital') less than 1km away from PH which offered the same services as PH. As a result, six of PH's consultants had resigned to work at the new hospital. In the present action, the plaintiffs claimed for the amount of RM91.124m against the defendant and contended that the defendant's move to set up the new hospital was a fundamental breach of the JVA as the latter owed a fiduciary duty to ensure the success of PH; and that since the defendant was a shareholder in the JVA, it had access to PH 's business secrets which could be used to PH's detriment. In denying the plaintiffs' claim, the defendant argued that the JVA did not prohibit competition between the parties either legally or contractually; and that the relationship between the parties under the JVA was not a partnership and therefore, the parties were not in a fiduciary relationship.

Held, allowing the claim:

(1) It was fair for the plaintiffs to expect the defendant to act like business partners and not like rivals. No reasonable businessman would want to engage in a joint venture knowing that his business partner would be competing with the business of the joint venture. Despite being the majority shareholders in the joint venture company, the plaintiffs stood to be disadvantaged by the setting up of the new hospital. The defendant with a market capitalisation of RM4billion would not be impacted in the same way that plaintiffs would be impacted (see para 5).

(2) The plaintiffs had established a breach of the JVA by the defendant. The setting up of the new hospital to compete with PH was contrary to the

spirit and objective of the agreement and constituted a fundamental breach. The conflict of interest was obvious and the competition between PH and the new hospital would have been on unfair terms as the defendant, being a shareholder in PH, was privy to all confidential information on PH which could be used to its advantage (see paras 22 & 25).

(3) The plaintiffs and the defendant were in a fiduciary position as between themselves. They had a contractual obligation under the JVA to prosper PH and not to act to its detriment. That obligation was sacrosanct and anything done to the contrary by either party violated that obligation. The defendant, as a separate business entity, had every right to compete with any business concern of like character. However, in this case, it owed a fiduciary duty to the plaintiffs, the exercise of that right could not impinge on the plaintiffs' legitimate expectation to a fair and equitable performance of the JVA for to do so, would defeat the objective behind the joint venture and struck at the root of the contractual relationship between the parties (see paras 20 & 22).

(4) The amount that should fairly be awarded to the plaintiffs should be the lower side of the estimation which was the sum of RM70.486m rather than the higher sum of RM91.124m (see para 52).

[Bahasa Malaysia summary

Plaintif-plaintif telah menubuhkan hospital persendirian ('HP') dan memasuki perjanjian usaha sama ('PUS') dengan defendan yang bertanggungjawab dalam, antara lain memperuntukkan sokongan kewangan. Walau bagaimanapun, plaintif-plaintif kemudiannya mendapati yang defendan semasa menubuhkan hospital baru ('hospital baru') kurang daripada 1km jauhnya daripada HP menawarkan khidmat sama seperti HP. Akibatnya, enam perunding HP telah berhenti kerja untuk bekerja di hospital baru tersebut. Dalam tindakan ini, plaintif-plaintif menuntut untuk sejumlah RM91.124 juta terhadap defendan dan berhujah bahawa perbuatan defendan untuk menubuhkan hospital baru tersebut dalah kemungkiran asas PUS kerana defendan mempunyai kewajipan fidusiari untuk memastikan kejayaan HP; dan memandangkan defendan adalah pemegang saham dalam PUS tersebut, ia mempunyai akses kepada rahsia perniagaan HP yang mana boleh diguna untuk menjejaskan HP. Dalam menafikan tuntutan plaintif-plaintif, defendan berhujah bahawa PUS tidak melarang pertandingan di antara pihak-pihak sama ada secara undang-undang atau secara kontrak; dan bahawa hubungan di antara pihak-pihak di bawah PUS bukan rakan kongsi dan oleh itu, pihak-pihak bukan dalam hubungan fidusiari.

Diputuskan, membenarkan tuntutan:

(1) Adalah adil untuk plaintif-plaintif menjangka defendan bertindak

seperti rakan perniagaan dan bukan seperti lawan. Tiada ahli perniagaan yang munasabah hendak menjalankan usaha sama dengan mengetahui yang rakan perniagaannya akan bertanding dengan perniagaan usaha sama. Meskipun sebagai pemegang-pemegang saham majoriti di dalam syarikat usaha sama, plaintif-plaintif akan rugi dengan penubuhan hospital baru tersebut. Defendan dengan permodalan pasaran sebanyak RM4 bilion tidak akan terjejas seperti plaintif-plaintif yang akan terjejas (lihat perenggan 5).

(2) Plaintif-plaintif telah membuktikan perlanggaran PUS oleh defendan. Penubuhan hospital baru untuk bertanding dengan HP adalah bertentangan dengan semangat dan objektif perjanjian dan membentuk perlanggaran asas. Konflik kepentingan adalah jelas dan pertandingan di antara HP dan hospital baru akan menjadi tidak adil memandangkan defendan, sebagai pemegang saham di dalam HP, adalah privi kepada kesemua maklumat sulit mengenai HP yang boleh digunakan bagi kelebihannya (lihat perenggan 22 & 25).

(3) Plaintif-plaintif dan defendan berada dalam kedudukan fidusiari di antara mereka. Mereka mempunyai tanggungjawab kontrak di bawah PUS untuk menjayakan HP dan bukan untuk bertindak untuk menjejaskannya. Tanggungjawab tersebut tidak boleh dipertikaikan dan apa-apa yang dibuat bertentangan oleh satu pihak melanggar tanggungjawab tersebut. Defendan, sebagai entiti perniagaan yang berasingan, mempunyai hak untuk bertanding dengan mana-mana perniagaan yang bersifat sama. Walau bagaimanapun, dalam kes ini ia menanggung kewajipan fidusiari kepada plaintif-plaintif, pelaksanaan hak tersebut tidak dapat mempengaruhi jangkaan sah kepada pelaksanaan adil dan berekuiti PUS kerana untuk berbuat demikian, akan mematahkan objektif usaha sama tersebut dan menjejaskan asas hubungan kontrak di antara pihak-pihak (lihat perenggan 20 & 22).

(4) Jumlah yang adil yang patut diawardkan kepada plaintif-plaintif sepatutnya bahagian rendah anggaran yang mana adalah jumlah RM70.486 juta dan bukan jumlah tinggi sebanyak RM91.124 juta (lihat perenggan 52).]

Notes

For cases on agreement, see 3(2) *Mallal's Digest* (4th Ed, 2013 reissue) paras 3106–3137.

Cases referred to

Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177, KBD (refd)

Brian Pty Ltd v United Dominions Corp Ltd [1983] 1 NSWLR 490, CA (refd)

British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railway Co of London, Ltd [1912] AC 673, HL (refd)

Bumiputra-Commerce Bank Bhd, Kuala Terengganu v Chendering Development Sdn Bhd & Ors [2004] 1 MLJ 657; [2004] 2 AMR 401, CA (refd)
Chaplin v Hicks [1911] 2 KB 786, CA (refd)
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)
Fitzgerald v Masters (1956) 95 CLR 420 (refd)
Frederick Thomas Kingsley v Secretary of State for India AIR 1923 Cal 49, SC (refd)
Hadley & Anor v Baxendale & Ors (1883–1860) All ER Rep 461 (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481, CA (refd)
Haw Par Brothers International Ltd & Anor v Jack Chiarapurk & Ors [1991] 2 MLJ 428, HC (refd)
Hospital Products Ltd v United States Surgical Corpn (1985) 156 CLR 41, HC (refd)
Ilkiw v Samuels and Others [1963] 2 All ER 879, CA (refd)
Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd [2006] 6 MLJ 544; [2007] 2 CLJ 127, CA (refd)
Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1, PC (refd)
National Coal Board v Wm Neill & Sons (St Helens) Ltd [1984] 1 All ER 555, QBD (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474, SC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265, CA (refd)
United Dominions Corp Pty v Brian Pty Ltd (1985) 1 ALJR 157, HC (refd)
Victoria Laundry (Windsor) Ld v Newman Industries Ld; Coulson & Co Ld (Third Parties) [1949] 2 KB 528, CA (refd)

Legislation referred to

Contracts Act 1950 s 74(1)
Partnership Act 1961

Muhammad Adam Abdullah (S Maniarasan with him) (Adam Abdullah & Mani) for the plaintiffs.
Yogesswary Singam (Jagjit Kaur with her) (Zainal Abidin & Co) for the defendant.

Abdul Rahman Sebli J:

THE FACTS

[1] On 16 August 1993 the first plaintiff, who is a medical doctor by profession set up a private hospital known as Hospital Adnan Sulaiman Sdn Bhd. The second plaintiff is his brother and is an accountant. On 30 May 1995

the two brothers entered into a joint venture agreement incorporating shareholders agreement ('the JV agreement') with the defendant Kumpulan Perubatan (Johor) Sdn Bhd, a conglomerate with a market capitalisation of RM4billion and is in the business of establishing and running private hospitals. The agreement was prepared by the defendant. Pursuant to the JV agreement Hospital Adnan Sulaiman Sdn Bhd's name was changed to Hospital Penawar Sdn Bhd ('Hospital Penawar') and the second plaintiff has since been appointed its director and administrator. In this judgment the words 'Hospital Penawar', 'the joint venture hospital' and 'the joint venture company' shall be used interchangeably. The shareholding in the joint venture hospital is as follows:

(a) the first plaintiff — 45%;

(b) the second plaintiff — 25%; and

(c) the defendant — 30%.

[2] The identified objective of the joint venture was to combine the parties' respective resources and expertise 'for their mutual benefit in the business' of Hospital Penawar. Article IV of the JV agreement imposes on the defendant the obligation 'to provide financial and other support in pursuance of the objectives of the JVC'. Clause 4 of article XVIII further stipulates that 'in all cases they shall each of them use their best endeavours to ensure that this agreement shall operate as between themselves fairly and equitably'.

[3] The incorporation of Hospital Penawar was therefore for the purpose of combining the parties' resources and expertise in pursuit of their mutual benefit in the business of the joint venture hospital, and they have agreed to the following:

(a) the defendant was to provide financial and other support in pursuance of the objectives of the JV agreement; and

(b) the parties must use their best endeavours to ensure that the JV agreement shall operate fairly and equitably as between themselves.

[4] The deal did not turn out the way the plaintiffs had hoped for. They later discovered through 'market talk' that the defendant was undertaking the construction of a new hospital in Pasir Gudang known as Pasir Gudang Specialist Hospital Sdn Bhd ('the new hospital') which is located within 1km radius from Hospital Penawar. They also discovered that the new hospital was going to provide the same medical services as those provided by the joint venture hospital. The plaintiffs raised their objection to the setting up of the new hospital as it would be competing with Hospital Penawar. The defendant's response to the objection was to tell the plaintiffs that the JV agreement did not prohibit competition between the parties either legally or contractually, that

there was enough market for both the joint venture hospital and the new hospital in the Pasir Gudang area and that the defendant had sufficient safeguard to ensure that there would not be any conflict of interest.

[5] It is fair I think for the plaintiffs to expect the defendant to act like business partners and not like rivals. No reasonable businessman would want to engage in a joint venture knowing that his business partner would be competing with the business of the joint venture. Despite being the majority shareholders in the joint venture company, the plaintiffs stood to be disadvantaged by the setting up of the new hospital. The defendant with a market capitalisation of RM4billion will not be impacted in the same way that the plaintiffs will be impacted. This is to state the obvious as the new hospital is owned by the defendant and the plaintiffs have no shareholding in it.

THE PLAINTIFFS' CASE

[6] The plaintiffs' contention is that although their relationship with the defendant is not that of a partnership, it is akin to that of partners and it was the parties' expressed intention that the JV agreement should operate between them fairly and equitably. It was argued that the construction of the new hospital by the defendant and the involvement of the defendant in the new hospital was in breach of the implied and express terms of the JV agreement, a breach of fiduciary duties that exist between joint venturers as well as being in contravention of the law.

[7] It was further argued that the operation of the new hospital would result in a reduction of profits for Hospital Penawar, migration of skilled and semi-skilled professionals from the joint venture hospital to the new hospital and expose the business secrets of the joint venture hospital to the new hospital as the defendant, being a shareholder in Hospital Penawar would be involved in both the joint venture hospital and the new hospital. Additionally, given the sheer size and capability of the defendant, Hospital Penawar will not be in a position to compete with the new hospital once it began operation and all these will result in a reduction or loss of profits for the joint venture hospital. From the plaintiffs' point of view therefore the setting up the new hospital was a betrayal by the defendant of its covenants under the JV agreement to act 'for their mutual benefit in the business' of Hospital Penawar and to 'use their best endeavours to ensure that this agreement shall operate as between themselves fairly and equitably' in all cases. The plaintiffs' claim is for RM91,124,000 being special damages for breach of contract.

[8] It needs to be pointed out at this juncture, and this is not in dispute, that the plaintiffs are not against the setting up of private hospitals by the defendant. Indeed the plaintiffs did not object to the defendant's participation in the

management and setting up of other hospitals since 2000. The hospitals which the defendant owns are spread across the country and in Johor alone it has three new hospitals, namely in Kluang, Muar and Bandar Dato' Onn. The plaintiffs' grievance is that the setting up of the new hospital at a location so close to Hospital Penawar is detrimental to the interests of the joint venture hospital and out of line with the spirit of the JV agreement. It runs counter to the objective of combining the parties' resources and expertise for their mutual benefit in the business of the joint venture hospital. This is the bone of the plaintiffs' contention.

THE DEFENCE

[9] The defendant's position is simple, and that is, it is not in breach of the JV agreement for the following reasons:

(a) there is no restriction on any joint venture party from competing with each other on the joint venture company;

(b) there is no legal or contractual restraint on the defendant from setting up the new hospital;

(c) any application to set up a private hospital is subject to the Ministry of Health's zoning approval; and

(d) the zoning approval duly obtained by the defendant from the Ministry of Health shows that the healthcare facility or service already available in the Pasir Gudang area is insufficient and there is a need for further healthcare facility and there is a need for further healthcare facility and service in the area.

WHETHER THE DEFENDANT IN BREACH OF THE JV AGREEMENT

[10] The law leans in favour of upholding bargains and not striking them down willy-nilly: *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625 (FC). It is trite principle of general application that the construction of a contract is a matter of law and the contract must be read as a whole: see for instance *National Coal Board v Wm Neill & Sons (St Helens) Ltd* [1984] 1 All ER 555 where the court highlighted four principles in construing a contract, as follows:

(a) the construction of a contract is a question of law;

(b) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence;

(c) a contract must be construed as at the date it was made; it is not legitimate to construe it in the light of what happened years after or even days later; and

(d) the contract must be considered as a whole and also, as far as practicable, to give effect to every part of it.

[11] It is also trite principle that the court will generally give words of a contract their plain and ordinary meanings even if it leads to an unreasonable result unless the ordinary meaning leads to an absurd result, in which case the ordinary meaning should be construed so as to avoid the absurdity: *Fitzgerald v Masters* (1956) 95 CLR 420. In *Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd* [2006] 6 MLJ 544; [2007] 2 CLJ 127 the Court of Appeal held that when the court is asked to determine the true nature of the bargain between the contracting parties it is required to take an objective approach and must have regard to the factual matrix forming the background to the contract to determine the objective aim or purpose of the transaction. It is the objective view based on the test of the reasonable man that is the determining factor and not the subjective view of a party to the contract.

[12] In determining whether there had been a breach of the JV agreement, the question to ask is whether the contracting parties are fiduciaries as between themselves and if so whether the setting up of the new hospital was a breach of that fiduciary responsibility by the defendant. The defendant vigorously denies the existence of any fiduciary relationship. The underlying thrust and underpinning of the defendant's argument is that since the plaintiffs and the defendant are not partners but mere shareholders in the joint venture company no fiduciary relationship has been created. Presumably learned counsel for the defendant is speaking in terms of a partnership under the Partnership Act 1961. It was submitted that the fiduciary principle can only be invoked if there exists a partnership between the parties to the JV agreement. Clause 3 of the agreement under the heading 'Partnership' was cited to negate any such relationship. This clause falls under article XVII of the JV agreement and is couched in the following terms:

> Clause 3 - Partnership
>
> Nothing in this agreement shall be deemed to create a partnership between the parties hereto.

[13] By virtue of cl 3 above it was contended that the plaintiffs' action must fail as they are suing the defendant not as partners but in their capacity as shareholders in the joint venture company. The corollary to this argument is that only if the parties are partners could the present action be filed against the defendant. It was submitted that a shareholder is not in a fiduciary position vis a vis the joint venture company nor amongst its shareholders. The point raised

is not without precedent. It was considered by the Supreme Court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 where it was held, on the facts of the case that if the agreement entered into by the litigating parties was a joint venture agreement then their relationship was a fiduciary one. Jemuri Serjan CJ (Borneo) delivering the judgment of the court quoted with approval the following observations by Hutley JA in *Brian Pty Ltd v United Dominions Corp Ltd* [1983] 1 NSWLR 490 at p 496:

> Though joint venture agreements are common, particularly in the resource development field, there is little authority as to the responsibilities of the joint venturers, inter se. In *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, what was described as a joint venture was held to be a partnership. That joint ventures have fiduciary relationships, inter se would seem to be essential for the efficacy of the device.

[14] In *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 the Court of Appeal held the following to be indicative of the existence of a fiduciary relationship:

(a) the existence of a relationship of confidence, which may be abused;

(b) inequality of bargaining power; and

(c) instances of vulnerability.

[15] The court in that case was concerned with the relationship between the club and the promoters of the club. The promoters argued that there were no fiduciary duties between them and the club, which brought an action in a representative capacity through some members. The High Court however found them to be fiduciaries as promoters of the club. In the Court of Appeal the development of fiduciary duties was discussed and the court held, inter alia, that whether or not a fiduciary duty exists depends on the facts of the case and that the categories of fiduciary duties are never closed.

[16] It is the defendant's contention that the following factors dispel any notion of a fiduciary relationship existing between the plaintiffs and the defendant:

(a) the plaintiffs' own admission at the trial that the defendant never rendered itself as partner to the plaintiffs;

(b) although the JV agreement was prepared by the defendant both parties had equal bargaining power when they entered into the agreement;

(c) under the JV agreement the first and second plaintiffs together are to remain the majority shareholders holding 70% shares in the JV company

and that by virtue of article V cl 1(B)(d) could pass a resolution on any matter which may have a material adverse effect on the profitability of Hospital Penawar; and

(d) the second plaintiff had been appointed as Hospital Penawar's administrator without the prior approval of the defendant pursuant to article V cl 4, in blatant breach of the JV agreement.

[17] In my view the issue of partnership is irrelevant in determining whether a fiduciary relationship exists between the plaintiffs and the defendant. What the court has to consider is whether as joint venturers they are in a fiduciary position as between themselves. *Newacres* has decided that they are in such relationship. The truth is, in all joint ventures involving corporate entities the joint venturers are shareholders. It cannot be otherwise. There is therefore no dichotomy between shareholders and directors vis a vis the joint venture company as contended by learned counsel for the defendant. What in law is a joint venture? The *Oxford Dictionary of Law* defines a joint venture as follows:

> A commercial undertaking entered into by two or more parties, often by setting up a separate joint-venture company in which all partners have shares, to enable resources and skills to be shared.

[18] In *The Free Dictionary* by Farlex which is accessible online the term 'joint venture' is defined to mean an association of two or more companies or individuals engaged in a solitary business enterprise for profit without actual partnership or incorporation. It goes on to say, amongst others, that each joint venturer has a fiduciary responsibility towards the other joint members, owes a duty of care to the other members, and has a duty to act in good faith in matters that concern the common interest of the joint venture undertaking. I accept this to be an accurate description of a joint venture. It accords with the decision of the Supreme Court in *Newacres* and the authorities cited therein. A fiduciary responsibility is therefore a *sine qua non* in any joint venture agreement. On the fact pattern of the present case it is clear to me that the plaintiffs and the defendant are in a fiduciary position as between themselves.

SCOPE OF FIDUCIARY DUTIES

[19] In *Tengku Abdullah Ibni Sultan Abu Bakar* Gopal Sri Ram JCA (as he then was) quoted with approval the following passage from the minority judgment of Mason J in the Australian High Court (which is the apex court of Australia) case of *Hospital Products Ltd v United States Surgical Corpn* (1984) 156 CLR 41 on the scope of fiduciary duties:

A The categories of fiduciary relationships are infinitely varied and the duties of the fiduciary vary with the circumstances which generate the relationship. Fiduciary relationships range from the trustee to the errand boy, the celebrated example given by Fletcher Moulton LJ in his judgment in *Re Coomber* [1911] 1 Ch 723, in which, after referring to the danger of trusting to verbal formulae, he pointed out that the
B nature of the curial intervention which is justifiable will vary from case to case. In accordance with these comments it is now acknowledged generally that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case: *Phipps v Boardman* [1967] 2 AC 46; *New Zealand Netherlands Society 'Orange' Inc v Kuys* (1973) 2 NZLR 163; *Canadian Aero Service Ltd v O' Malley* (1973) 40 DLR (3d) 371.
C

[20] What then is the scope of the fiduciary duties between the plaintiffs and the defendant? The answer lies within the four walls of the JV agreement, the pillar of which is the parties' objective aim or purpose, which is to combine
D their respective resources and expertise 'for their mutual benefit in the business' of Hospital Penawar and not, it will be noted for their mutual benefit in the business of the defendant, Kumpulan Perubatan (Johor) Sdn Bhd or any other party. By the terms of the JV agreement, the parties are under a contractual obligation to prosper Hospital Penawar and not to act to its detriment. That
E obligation is sacrosanct and anything done to the contrary by any party to the agreement would be a violation of that obligation. Considered in this light it is untenable for learned counsel for the defendant to argue that since the plaintiffs and the defendant are not partners but mere shareholders in the joint venture company, no fiduciary position exists between the shareholders vis a vis
F the joint venture company nor amongst its shareholders. Clearly the defendant owes a fiduciary duty to the plaintiffs as fellow members in the joint venture. It would be contrary and repugnant to the spirit of the JV agreement for the defendant to do any act that is detrimental to the interests of the joint venture company, to which it owes a duty to act in the utmost good faith in all matters
G that concern the common interest of the joint venture. It cannot be an act in good faith, let alone in the common interest of the joint venture for the defendant to set up a rival hospital to compete with the joint venture hospital and to the detriment of the plaintiffs who are small players in the whole scheme of things. If the defendant's argument were to be followed to its logical
H conclusion, then technically there would be no legal impediment for the defendant to set up a hospital right next to Hospital Penawar. That cannot by any stretch of the imagination be an eventuality that was within the contemplation of the parties when they entered into the JV agreement. On the contrary that would be an eventuality that they had impliedly discounted.
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[21] Having regard to the nature of the joint venture business, the objective of the joint venture, and the fiduciary nature of the relationship between the parties, it is my judgment that the defendant is prohibited from competing directly with Hospital Penawar, the joint venture hospital. The new hospital is

clearly a competitor to Hospital Penawar as it provides the same medical services as those already provided by the joint venture hospital. This is evident from the advertisement for medical consultants placed by the new hospital. The defendant has not provided any documentary evidence to support its claim that the new hospital will be offering different sub-speciality or super speciality services.

[22] As a separate business entity the defendant has every right to compete with any business concern of like character but where, as in this case it owes a fiduciary duty to the other members of the joint venture, namely the plaintiffs, the exercise of that right must not impinge on the plaintiffs' legitimate expectation to a fair and equitable performance of the JV agreement for to do so would be to defeat the objective behind the joint venture. It strikes at the root of the contractual relationship between the parties and indeed the nature of the commercial venture contemplated by the agreement, that the parties' respective resources and expertise were to be combined 'for their mutual benefit' in the business of Hospital Penawar and that in all cases 'they shall each of them use their best endeavours' to ensure that the JV agreement shall operate fairly and equitably as between themselves. There is nothing fair nor equitable in the defendant's act of setting up the new hospital in competition with Hospital Penawar. I find no substance to the defendant's argument that cl 4 of article XVIII of the JV agreement is 'a mere agreement to exercise an earnest attempt without more'. The clause is not a mere puff. It is a fundamental term which lays down the ground rules as to how the parties are to conduct themselves in the performance of their common obligations under the JV agreement. A deviation by either party would constitute a fundamental breach of the agreement. Setting up a new hospital which competes directly with the joint venture hospital for the same clientele and without regard for its pecuniary impact on the joint venture hospital is a deviation from that undertaking.

[23] In *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 the Court of Appeal had occasion to deal with the 'best endeavours' clause in a joint venture agreement. Gopal Sri Ram JCA (as he then was) speaking for the court said at p 497:

> It is axiomatic that mutual trust and confidence between joint venturers is essential for the proper working of the relationship. And where, as in the present instance, there is reliance by one joint venturer upon the skill or expertise professed by the other in the subject matter of the enterprise, there is, in my judgment, a duty upon that other to use his best endeavours to ensure the success of the venture. Equity will, in my view, imply such an obligation in the absence of an express term in the particular joint venture agreement.

> The joint venture agreement in the present case expressly stipulates such an obligation in the form of the 'best endeavours clause'. That meant that Hartela was under a duty to use its best endeavours to promote the interests of Hartecon. The circular resolution of 23 March 1983 was not in the best interest of Hartecon. In fact it spelled disaster for Hartecon. Hartela knew that. It was the expert. It should have warned Ferrostaal of the danger. That was the extent of its fiduciary duty. But it failed to warn Ferrostaal. That, in my view, amounts to a breach of the fiduciary duty owed in the circumstances of the present case. The arbitrator so held. He was right.

[24] Going by the scheme of the JV agreement I agree with learned counsel for the plaintiffs that in spirit and substance the agreement is about the plaintiffs and the defendant combining their resources for their mutual benefit and not about the defendant providing resources and expertise to the plaintiffs to set up a private hospital. It is certainly not about the defendant doing some kind of charitable work for the plaintiffs at the defendant's expense or about the plaintiffs hitching a ride on the defendant's reputation and goodwill, as learned counsel for the defendant seems to be suggesting, albeit vaguely. It will be remembered that the first plaintiff already had a private hospital of his own before he and his brother entered into the JV agreement with the defendant. In fact Hospital Penawar was Hospital Adnan Sulaiman before its incorporation as the joint venture company.

[25] While there is no guarantee of profits as rightly pointed out by the defendant, the defendant must not do any act that will undermine the very foundation of their fiduciary relationship — a relationship that is based on mutual trust and confidence for their mutual benefit in the business of the joint venture company. Each and every member of the joint venture must use his best endeavour to ensure the success of the venture, not to lead it down the path of destruction. This is the crux of the matter, and the defendant has effectively broken that mutual trust and confidence by setting up the new hospital in direct competition with Hospital Penawar. The conflict of interest is obvious as the defendant being a shareholder in Hospital Penawar will have access to pricing information, management accounts, confidential information, business modules and secrets of the joint venture company whereas the plaintiffs have no such access to the same information in relation to the new hospital. In short the competition will be on unfair terms as the defendant is privy to all confidential information on Hospital Penawar which it could use to its advantage whereas the plaintiffs do not have such advantage over the new hospital. In *United Dominions Corp Pty v Brian Pty Ltd* (1985) 1 ALJR 157 the creation of a fiduciary relationship between joint venturers was put in this way by Dawson J at p 681:

> Although the relationship between participants in a joint venture which is not a partnership will be governed by the particular contract rather than by extrinsic principles of law, the relationship may nevertheless be a fiduciary one if the necessary confidence is reposed by the participants in one another.

[26] In *Haw Par Brothers International Ltd & Anor v Jack Chiarapurk & Ors* [1991] 2 MLJ 428 the court made the following observations with regard to certain confidential information in a joint venture:

> In the light of the brief facts set out above it is quite clear that the plaintiffs and the first three defendants are in a joint venture, a venture to manufacture, promote, sell and develop the Tiger Brand products, including the Tiger Balm products, for mutual advantage and profit. The confidential information which would be furnished by the plaintiffs to the joint companies should only be used for the purpose of manufacturing the Tiger Brand products by the joint companies and not for any other purpose.

[27] The defendant with a 30% shareholding in Hospital Penawar may be a minority shareholder but it is no match for the joint venture company if competition is the name of the game. The fact that the plaintiffs together hold the majority share and being concerned with the profitability of Hospital Penawar as pointed by learned counsel for the defendant is no reason for the defendant to treat the joint venture company as though it is a business rival. In terms of size and capability, Hospital Penawar can be likened to David and the defendant to Goliath. We all know that David came out victorious in the fight against the mighty Goliath but myth and reality do not always match. Given the circumstances, the defendant cannot, in making any decision in its own business undertakings disregard the interests of the plaintiffs on matters affecting the JV agreement or worse, taking affirmative actions that are detrimental to the interests of the joint venture company. It must in all matters affecting Hospital Penawar act fairly and equitably, as covenanted in the JV agreement. I am unable to accept the defendant's argument that the arrangement between the parties was purely commercial and that their dealings have always been at arm's length.

EFFECT OF ESTABLISHMENT OF THE NEW HOSPITAL

[28] The detrimental effect to Hospital Penawar of the establishment of the new hospital did not take long to rear its head. The testimony of the second plaintiff is that the new hospital has lured three out of the 12 consultants of Hospital Penawar to the new hospital. As a matter of fact they were immediately offered jobs in the new hospital upon their resignations from Hospital Penawar. According to the second plaintiff, as of the trial date six consultants have tendered their resignations from Hospital Penawar. He further testified that unlike in previous years, this year alone (2013) five specialists have tendered their resignations which he believed is related to the opening of the new hospital in April 2013. And this according to the plaintiffs is only the beginning. Their vulnerability has indeed been exposed. At the trial the defendant's witnesses SD1, SD3 and SD4 were at pains to impress upon the court that the new hospital was not a competitor to Hospital Penawar, not until

they were pressured by cross-examination into admitting that the new hospital will in fact compete for the same market as that of the joint venture hospital. It is obvious that they were still adamant in maintaining their stand that the new hospital is not a competitor to the joint venture hospital. This attitude on the part of the top management of the defendant is clear enough indication that the plaintiffs' problems arising from the establishment of the new hospital is the least of the defendant's concern. There can be no doubt that the new hospital is a threat to Hospital Penawar and by extension to the plaintiffs who are the majority shareholders.

[29] Engku Mashuri Engku Husin ('SD1') who is the corporate manager of the defendant in her evidence asserted that the new hospital is not a threat to Hospital Penawar and 'not really competing with Hospital Penawar' because according to her the new hospital is complementing the services of Hospital Penawar. This is hardly consistent with the defendant's pleaded defence that the parties are not precluded from competing with one another. Even so her evidence is contradicted by her own working paper for the establishment of the new hospital which the defendant submitted to the Ministry of Health. In that paper she stated that Hospital Penawar is a competitor. This is also confirmed by another defence witness Norita bt Ahmad ('SD3') who testified that based on the defendant's working paper, the new hospital will be competing with Hospital Penawar. SD3 agreed that the three specialists who resigned from Hospital Penawar had applied for positions in the new hospital and admitted that their resignations from Hospital Penawar will have adverse financial impact on the performance of Hospital Penawar. She went on to confirm that the applications for appointment by some other medical consultants from Hospital Penawar were rejected and the rejections were done after the present action was filed in court. In all probability the migration of consultants from Hospital Penawar to the new hospital would have gone unabated had it not been for the filing of the present action. The plaintiffs are understandably alarmed at the turn of events since the formation of the joint venture company.

[30] Amiruddin bin Abdul Satar ('DW4') the managing director of the defendant was only reaffirming the obvious when he testified that there is going to be competition between Hospital Penawar and the new hospital. In the process this witness, like SD1 contradicted his report to the Ministry of Health where he had informed the Ministry that there is no direct competitor to the new hospital in the surrounding area as Hospital Penawar is within the KPJ Group of Hospitals, meaning to say the defendant's group of hospitals. This statement is grossly misleading and no doubt intentionally made. The truth is Hospital Penawar is not within the defendant's group of hospitals. This is a serious misrepresentation bordering on mischief and could have factored heavily in the minds of the decision makers in deciding whether to approve or to reject the defendant's application to set up the new hospital. It is therefore

incongruous for counsel for the defendant to argue that the plaintiffs cannot complain about the setting up of the new hospital as it had been approved by the government.

[31] The defendant contended that the zoning approval duly obtained by the defendant from the Ministry of Health shows that the healthcare facility or service already available in the Pasir Gudang area is insufficient and that therefore there is a need for further healthcare facility in the area. With due respect I do not see the relevance of the point in relation to the JV agreement. In the first place the defendant witnesses themselves confirmed that the director general of health is not concerned with any breach of the JV agreement in considering the defendant's application to set up the new hospital. Further and in any event the Director General of Health and the Ministry of Health are not parties to the JV agreement. There is therefore no nexus between the point taken and the question whether the defendant had breached the agreement.

[32] It is the defendant's pleaded case that it had complied with its obligations under the JV agreement. Reference was made to para 15 of the statement of defence which according to learned counsel has not been rebutted by the plaintiffs. Paragraph 15 reads as follows:

> Dengan merujuk kepada Perjanjian tersebut, salah satu daripada tanggungjawab Defendan adalah 'shall provide financial and other support in pursuance of the objectives of the JVC' (klausa 5(e)). Objektif JVC adalah 'shall carry on the business of establishing and managing a private Hospital having an initial capacity of 40 beds and including diagnosis facilities on inpatient and outpatients'. (Recital E). Defendan dengan tegasnya menyatakan bahawa setakat Mac 2012, Hospital Penawar Sdn Bhd mempunyai 12 'Consultants Specialist' dan 3 Pegawai Perubatan dan mempunyai 90 katil. Ini jelas membukti yang Defendan telah melaksanakan tanggungjawabnya seperti yang diperuntukkan dalam Perjanjian tersebut.

[33] First of all the question of non-rebuttal does not arise as para 15 of the defence is traversed by para 7 of the plaintiffs' reply to the defence, in the following terms:

> Berhubung dengan perenggan 15 Pembelaan, Plaintif-Plaintif mengatakan jikapun Defendan telah memenuhi obligasinya setakat yang dinyatakan, ini tidak membolehkan Defendan untuk melanggar terma-terma tersurat dan tersirat Perjanjian tersebut sella membelakangkan 'spirit' Perjanjian tersebut.

[34] Secondly, pleadings are not evidence and do not constitute proof of the facts asserted therein unless they are admitted. Once the pleaded facts are traversed and denied they must be proved by affirmative evidence failing which the pleadings remain dead letters without any evidential value whatsoever. As to the argument that the defendant had carried out its obligations under the JV

agreement, in particular with regard to recital E as pleaded in para 15 of the defence, I do not see how this issue has any bearing on the question of whether the defendant breached the agreement by setting up the new hospital to the detriment of the joint venture company. The bone of the plaintiffs' contention is the defendant's act of setting up a rival hospital to the detriment of Hospital Penawar and in breach of the JV agreement and not how much facilities the defendant had provided for the joint venture hospital.

CONCLUSION ON LIABILITY

[35] For reasons aforesaid I am satisfied on a preponderance of probabilities that the plaintiffs have established a breach of the JV agreement by the defendant. It is clear to me that setting up of the new hospital by the defendant was contrary to the spirit and objective of the agreement and constituted a fundamental breach going to the root of the contractual relationship between the parties.

DAMAGES

[36] Once a breach of contract is established, the successful party is entitled to compensation as provided by s 74(1) of the Contracts Act 1950 which stipulates as follows:

> When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they make the contract, to be likely to result from the breach of it.

[37] The guiding principle is that a party seeking substantial damages must prove the sum claimed. The locus classicus on the point is the oft-quoted judgment of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177 where His Lordship said:

> Plaintiffs must understand that if they bring action for damages it is for them to prove their damages. It is not enough to write down the particulars and, so to speak, throw them at the head of the court saying, 'this is what I have lost. I ask you to give me these damages'.

[38] In *Ilkiw v Samuels and Others* [1963] 2 All ER 879 Lord Diplock had this to say on special damages:

> In my view, it is plain law — so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last one hundred years — that you can recover in an action only special damage which has been pleaded, and, of course, proved.

[39] The compensation functions to place the plaintiff in the same position in which he would have been had he not sustained the injury of which he complains: *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railway Co of London, Ltd* [1912] AC 673. The damages must not however be too remote: *Hadley & Anor v Baxendale & Ors* (1883–1860) All ER Rep 461 where the principle is laid down in the following terms:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[40] In *Victoria Laundry (Windsor) Ld v Newman Industries Ld; Coulson & Co Ld (Third Parties)* [1949] 2 KB 528 Asquith LJ in delivering the judgment of the court analysed the leading authorities on the subject and surmised at p 539:

> What propositions applicable to the present case emerge from the authorities as a whole, including those analysed above? We think they include the following:
>
> (1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim v Chicoutimi Pulp Company (1)*). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,
>
> (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.
>
> (3) What was at the time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.
>
> (4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley v Baxendale (2)*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things,' of such a kind that a breach in those special

circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.

(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of *A/B Karlshamms Oljefabriker v Monarch Steamship Company Limited (1)*).

(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at p 158, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy.

[41] On these principles, what is the effect of their application to the facts of the present case? The sum that the plaintiffs are claiming is the maximum amount of damages based on their 70% shareholding in Hospital Penawar. The amount claimed is based on the Ferrier Hodgson MH Report ('the FHMH report') which is marked as exh P14 and the expert testimony of the maker of the report, Andrew Heng ('SP4'). SP4 is a chartered accountant and incidentally a member of the Malaysian Bar. His firm Messrs Ferrier Hodgson MH Sdn Bhd is a corporate advisory, restructuring and turnaround company originally from Australia and has partnering firms all across the globe. He has given evidence in court on numerous occasions and his evidence has been accepted by the court. This is undisputed and there is also no issue as to his expertise. SP4 was appointed by the plaintiffs as an independent advisor to determine the potential losses suffered by Hospital Penawar due to the breach of the JV agreement. His testimony is that the income statement forecast for Hospital Penawar was for the year ending 2013 to the year ending 2029, ie a projection of 16 years. His estimation of the potential loss to the plaintiffs based on their 70% share for that period is a minimum of RM70.486m to a maximum of RM91.124m. SP4's basis for calculating the loss for 16 years is due to the fact that the projected loss of business for Hospital Penawar will be between the range of 50%–70%. Following this loss, with the projected growth at the rate of 8% and factoring a price increase of 3% and a real growth rate of 5%, it will take Hospital Penawar approximately 16–19 years to revert back to its original business level prior to the establishment of the new hospital, hence the conservative acceptance of 16 years by SP4. He reviewed past trends of

Hospital Penawar's profits and the income statements provided by the plaintiffs. From the documents, he noted that between financial years 2008 and 2012, Hospital Penawar had recorded a gross profit margin of between 29% and 35%.

[42] In relation to market share, presently Hospital Penawar is the only hospital within a 5km radius of Pasir Gudang. With the opening of the new hospital, there will be two hospitals competing for the same clientele. SP4 testified that in the best case scenario, Hospital Penawar's business will be most affected in the first two years, then tapering off and holding steady at 50% of the market share. In the worst case scenario, Hospital Penawar's business will be most affected in the first two years, then tapering off and holding steady at 45% of the market share. This is due to the defendant's extensive customer base and stronger brand name. The variable costs have been kept at 47% based on the audited reports of Hospital Penawar while a discount rate of 5% has been given to the income projections. SP4 did not take into account the migration of consultants in estimating potential losses to Hospital Penawar. According to him if this factor was considered the losses would be much higher.

[43] The defendant contends that the FHMH report lacks probative value and at most is a provisional report for the following reasons:

(a) SP4 relied substantially on the income statement projection for Hospital Penawar in arriving at the estimated potential losses;

(b) SP4 did not independently verify the said income projection;

(c) SP4 did not independently verify the unaudited management accounts of Hospital Penawar; and

(d) the income statement projection which was prepared by Hospital Penawar is a third party document and there is no proof that the said income statement projection has been approved and adopted by the Board of Hospital Penawar.

[44] It is clear that the attack is on the probative value of SP4's evidence in relation to the FHMH report but learned counsel seems to be taking a different and inconsistent stand when submitting in the same breadth that SP4's evidence is inadmissible by citing the judgment of Edgar Joseph Jr J in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 where it was held, inter alia, that inadmissible evidence does not become admissible simply by reason of failure to object to its admission and that it is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties. With due respect I do not

see why SP4's evidence should be disregarded on the ground of inadmissibility. His evidence and the FHMH report are clearly admissible and relevant in determining quantum of damages.

[45] It is pertinent to note that the defendant failed to call another expert witness to rebut the evidence given by SP4. Expert evidence must be challenged by another expert. It cannot be done by way of submissions unless it can be shown that his evidence is inherently incredible. At the trial an attempt was made to call a subpoenaed witness one Encik Mohd Noor bin Abu Bakar to give evidence on the FHMH report but upon objection by the plaintiffs I disallowed the application. According to learned counsel for the defendant Encik Mohd Noor is an Independent Director of the Board of Hospital Penawar. It would appear that he is not even an expert witness. The defendant appealed against the decision but the appeal was dismissed by the Court of Appeal on 31 May 2013. There is therefore no longer any issue with regard to the non-calling of this subpoenaed witness.

[46] It was contended that the plaintiffs' losses if any have not crystallised as of the date of the filing of this action and are therefore hypothetical. It was further submitted that the plaintiffs have failed to tender real and factual evidence of actual loss of clientele, actual loss of professional and semi professional personnel and actual loss of profit due to the setting up of the new hospital. Reliance was placed on the decision of the Privy Council in *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1. That case involved the construction to be given to cl 17 of the contract, which stipulated that if the building was not ready for possession within 18 months from the date of the agreement, the purchaser was entitled to liquidated ascertained damages of 8%pa calculated from the date the building was to have been ready to the date of actual delivery of possession. The privy council held that upon its true construction, cl 17 imposed an obligation to pay a single sum to be calculated and ascertained at a particular date and that until that sum had been ascertained it did not become due and could not be sued for. In my view this proposition of law has no application to the factual matrix of the present case. The new hospital started operation around April 2013. The plaintiffs are not expected to fold their arms and wait for doomsday to arrive before filing the present suit to redress the wrong they have suffered due to the defendant's breach of the agreement, which occurred when the defendant set up the new hospital. Upon proof that the JV agreement had been breached, the plaintiffs are entitled to seek redress from the court to assess the damages they will suffer. They are entitled to be compensated for the loss of future profits which was within the reasonable contemplation of the parties and which is almost certain to happen with the setting up of the new hospital.

[47] Once it is shown that the kind of damages claimed is foreseeable, then

the guilty party is liable to the full extent so long as the extent of damages can been shown on the balance of probabilities: see *Bumiputra-Commerce Bank Bhd, Kuala Terengganu v Chendering Development Sdn Bhd & Ors* [2004] 1 MLJ 657; [2004] 2 AMR 401 where the Court of Appeal in upholding an award of damages for loss of profits amounting to RM29,279,017.58 held:

> We say that this was not a simple contract to lend money, but a contract for a definite purpose. Furthermore that purpose was clearly within the knowledge of the parties at the time of entering into the agreement and the consequence of its breach must have been within the contemplation of the parties. Thus all losses claimed by Chendering which arose naturally from the breach by the bank, and were also within the contemplation of the parties as likely to arise from such a breach within the requirements of s 74 of the Contracts Act and the rule in *Hadley v Baxendale* (1854) 156 ER 145 at p 151.
>
> We are also of the opinion that the learned judge was correct to hold that once it I shown that the kind of damages is foreseeable, then the guilty party is liable to the full extent of it so long as the extent of damages has been shown on the balance of probabilities (see *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd; Coulson & Co Ltd* [1949] 2 KB 528 at p 540; *Chitty on Contracts* (28th Ed), 1999 para 27-045.

[48] Even where damages are difficult to calculate the wronged party is still entitled to compensation. In *Chaplin v Hicks* [1911] 2 KB 786 the English Court of Appeal had to decide whether a lady, one of 50 selected for acting, and who was not given a reasonable chance to present herself for a final audition, was entitled to damages for the defendant's breach of contract. It was held that despite the various and difficult contingencies, (ie that the plaintiff may not have been ultimately selected) on which the results depended and the difficulty in calculating the damages with precision or certainty the wrong doer is not relieved from the necessity of paying damages for breach of contract. This is how Vaughan Williams LJ put it:

> Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract.

[49] Farwell LJ in his judgment in the same case dealt with the point in the following way:

> The case of *Richardson v Mellish (1)* affords a very good illustration on this point. There the question was raised whether in an action for breach of contract the jury could give damages for the loss of two voyages as captain of an East India-man, though the second had not been accomplished at the time of action, and in his

judgment Best CJ said (2): 'It is clear that the plaintiff could only be appointed for one voyage. But though that is the case, may not parties look to that which is the practice of the East India Company, that though they renew the appointment, they renew it in the person person? If that practice be legal, may I not say, if you had appointed me for the first voyage, I should have continued for the second? You have deprived me of the profits I should have made not only on the first voyage, but on the second also. It requires no legal head to decide this: common sense says, you are not to be paid for consequences which might not turn up in your favour; but the plaintiff is entitled to have a compensation for being deprived of that which almost to a certainty happens in these cases'. Now, the expression 'almost to a certainty' means that the contemplated event is probable, and the fact that it is very probable only increases the amount of damages which a jury would give.

[50] In the *Frederick Thomas Kingsley v Secretary of State for India* AIR 1923 Cal 49, a decision of the Supreme Court of India, the head note to the report reads:

> In cases admitting proof of such damages the amount must be established with reasonable certainty. But this does not mean that absolute certainty is required, nor in all cases, is there necessity for direct evidence as to the amount. Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement. Certainty to a reasonable extent is necessary and the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof. It must also be remembered that in the extreme case where the defendant has by his wrong, put it out of the plaintiff's power to prove the quantum of damage exactly, the presumption is against the defendant and the burden is upon him to reduce the amount from the highest possible estimate.

[51] In the present case, SP4 has explained the methodology he employed in calculating the future losses of Hospital Penawar. The details of his calculations are all found in the FHMH report (exh P14). Hence this is not a case of throwing damages at the head of the court and asking for such damages to be awarded. The calculations given in SP4's report as well as the source of his information were known to the defendants. In fact they had full and complete access to the documents referred to in the FHMH Report. Further, the income projections were based on audited documents provided by Hospital Penawar, in which the defendant is also a shareholder. These figures were never disputed by the defendant. It is therefore idle for the defendant to merely question the audited accounts without pointing to specifics to show that the figures relied on by SP4 are false, inaccurate or plainly wrong. The defendant could easily have done so as the documents were exchanged before the trial of this action. The defendant cannot now cast doubts on the income projections without first showing that such document is not reliable due to inaccuracies or

inconsistencies. In the absence of expert evidence to the contrary I accept SP4's calculations as an accurate estimate and a true reflection of Hospital Penawar's losses for the coming 16 years measured from the year 2013. I have no reason to doubt SP4's independence in the performance of his professional duties, albeit being advisor to an interested party in this dispute. In cross-examination SP4 testified that although he was appointed by the plaintiffs, his assessment was based on the loss that will potentially be suffered by Hospital Penawar and from there, attributed 70% of the losses to the plaintiffs to reflect the plaintiffs' shareholding. I am satisfied that SP4 had been fair in assessing the losses.

[52] For the foregoing reasons, I am satisfied that the plaintiffs have proved their claim for future loss of profits. Having regard to all the circumstances of the case I am of the view that the amount that should fairly be awarded to the plaintiffs would be the lower side of SP4's estimation, ie the sum of RM70.486m rather than the higher sum of RM91.124m. This is the amount that I have awarded to the plaintiffs.

Claim allowed.

Reported by Afiq Mohamad Noor